IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-689

JOHN D. PRATT,
Commissioner of the Massachusetts
Department of Public Welfare,

Appellant,

v.

CINDY WESTCOTT, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE APPELLANT

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INTRODUCTION

Appellant John D. Pratt, Commissioner of the Massachusetts Department of Public Welfare (Commissioner), submits this reply brief in order to

respond to the arguments advanced by plaintiffs-appellees Cindy Westcott, et al. (Westcott), defendant-appellee Secretary of Health, Education and Welfare (Secretary), and amici curiae American Civil Liberties Union, et al. (ACLU), in support of the District Court's remedy for the gender-based defect which it found in Section 407 of the Social Security Act, 42 U.S.C. § 607 (1976). The District Court required the Commissioner to provide AFDC-UF benefits to needy families if either parent met the federal definition of unemployment regardless of the employment status of the other parent (the dual wage-earner model of the AFDC-UF program). In his appeal, the Commissioner has maintained, as he did below, that the proper sex-neutral remedy is to condition eligibility upon the unemployment of the family's principal wage-earner (the principal wage-earner model of the AFDC-UF program).

ARGUMENT

I. All Parties and Amici Agree as a Matter of Legislative History That, When Congress Defined Eligibility for AFDC-UF Benefits in Terms of the Unemployment of the Father, It Assumed That Fathers Were the Principal Wage-Earners in Their Families.

While they oppose the principal wage-earner model of the AFDC-UF program, appellees and amici nevertheless agree with the Commissioner's reading of Section 407's legislative history. Congress enacted the AFDC-UF program in order to alleviate the plight of families whose breadwinner (i.e., principal wage-earner) had become unemployed. In its treatment of this problem, Congress assumed that the principal wage-earners whose unemployment would impoverish families were fathers, not mothers. Commissioner's brief, 14-26. Thus, in the portion of their brief addressing Section 407's constitutionality, plaintiffs-appellees press the point that:

> In both 1961 and 1967 Congress . . . generally discussed the role of parents as providers

> in sex stereotypical terms with the father as the breadwinner and the mother as a non-breadwinner homemaker. Westcott brief, 12.

See also Id., 26, 31-32, 34-37, 48-49, and 56. For the similar view of amici, see ACLU brief, 35 ("Congress was operating under the traditional assumption of the father's preeminent economic role in the family unit...."). See also Id., 17, 30-31, 34-35, and 78.

Although the Secretary does not address this dimension of Section 407's legislative history in his brief on remedy, his brief on Section 407's constitutionality asserts that "[t]he impetus for the enactment of Section 407 was not an unsupported belief, based on sexual stereotypes, that fathers were more likely than mothers to be breadwinners . . . ." Secretary's brief in No. 78-437, 33. The Secretary ignores the contrary evidence because his defense of Section 407's constitutionality is better served by portraying the intent of Congress to have been exclusively "to eliminate a specific flaw in the basic AFDC program - that program's tendency to induce fathers who were unable adequately to support their families to desert their homes so that their families could become eligible for benefits." Secretary's brief in No. 78-437, 13. In light of its adversarial origins,

the Secretary's presentation is undercut by the Interim Report of the Department of Justice's Task Force on Sex Discrimination. In its analysis of Section 407, the Task Force confirmed that:

> The limitation of benefits to families in which the father is unemployed was intended to exclude two parent families which could qualify for benefits even though one parent was fully employed. Rather than setting employment standards for both parents, however, Congress chose to require that the male parent be unemployed, apparently on the basis of the assumption that the male is always the primary breadwinner.[1]

The Secretary cannot now repudiate this firmly established reading of Section 407's legislative history.

This consensus of opinion reveals the answer to the remedial issue whether the principal wage-earner or the dual wage-earner model of a sex-neutral AFDC-UF pro-

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[1] Task Force on Sex Discrimination, Civil Rights Division, United States Department of Justice, Interim Report to the President 156 (Oct. 3, 1978).

gram would better "render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring). Since Congress used the term "father" as a proxy for the family's principal wage-earner, the principal wage-earner model "more nearly accords with Congress' wishes." Welsh v. United States, 398 U.S. at 355-56. The District Court's selection of the dual wage-earner model was thus reversible error.

II. The Secretary's Argument That His Statutory Power to Define Unemployment Precludes the Judiciary From Adopting the Principal Wage-Earner Model to Cure Section 407's Gender-Based Defect Overstates the Scope of His Power.

Although he took no position on the remedial issue before the District Court, the Secretary now informs this Court that his regulations precluded the District Court from adopting the principal wage-earner model of the AFDC-UF program advocated by the Commissioner. With reference to 45 C.F.R. § 233.100 (a) (1) (1978) (requiring states to admit the families of "any father"

meeting federal requirements into the AFDC-UF program), the Secretary contends that:

> That regulation, with a sex-neutral construction, requires that a state plan include any parent who meets federal requirements of "unemployment". No federal rule requires an "unemployed" father (or parent) to show that he has been the principal wage-earner in the family. Secretary's brief, 7.

This argument assumes its conclusion by incorporating the premise that the proper sex-neutral construction of the term "father" is the term "parent". Substitution of the indefinite term "parent" opens Section 407 to the dual wage-earner interpretation because it fails to specify which parent must be unemployed. The Secretary's argument thus begs the very question posed by the Commissioner's appeal: what sex-neutral substitute for the term "father" best fulfills the legislative conception and programmatic structure of the AFDC-UF program.

The Secretary's reliance on his rule-making powers is similarly unhelpful. Secretary's brief, 8 ("Appellant's request that the Court fashion a cy pres remedy . . . should be declined, because Congress prescribed a specific

device for filling statutory gaps. That device is the issuance of regulations by the Secretary."). In accordance with his assumption that the term "parent" is the necessary substitute for the term "father", the Secretary characterizes the selection of the principal wage-earner model as within the scope of his exclusive "authority to set the standards for the parental unemployment necessary to make a family eligible for AFDC benefits." Secretary's brief, 8. By means of this characterization, the Secretary seeks to block this Court from undertaking its own evaluation of the principal wage-earner model as the proper remedy for Section 407's gender-based defect.

The explanation for the Secretary's strategem lies in this Court's decision in Batterton v. Francis, 432 U.S. 416 (1977). From its examination of Section 407's reference to "unemployment (as determined in accordance with standards prescribed by the Secretary)", this Court concluded that:

> Congress in § 407(a) expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the

> Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect [original emphasis]. 432 U.S. at 425.

Consequently, "[w]hen a rule is legislative, the reviewing court has no authority to substitute judgment as to the content of the rule . . . ." K. Davis, Administrative Law Treatise §5.03 (1958).

The Secretary's reliance upon his power to define "unemployment" is a red herring, designed to distract the Court from his unreasoned substitution of the term "parent" for the term "father". With regard to the above-quoted language from Batterton v. Francis on which the Secretary relies (Secretary's brief, 6-7), Professor Davis points out that:

> The Court italicized the word "delegated", and that is the key to the whole analysis.... [B]ecause the regulation was issued pursuant to that delegation, it had "legislative weight".... K. Davis, Administrative Law Treatise §5.03 (1978 Supp.).

The delegation of rule-making authority in Section 407 extends only to the meaning of "unemployment". It does not encompass the meaning of the term "father". Congress did not, therefore, delegate the power to expand upon its premise that only the unemployment of the family's breadwinner would deprive a family of its means of support. Any regulation revising that premise would be ultra vires. See Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). Filling in large holes in a statutory structure — a proper administrative function — is different from building an annex.

The legislative history of the 1967 amendments to Section 407 confirms that, while delegating the power to define "unemployment" to the Secretary, Congress retained for itself the power to define the parent whose unemployment could establish eligibility. In 1967, Congress transfered the power to define "unemployment" from the states to the Secretary because the states had "adopted such varying definitions of 'unemployment' that uniform administration of the program became impossible." Philbrook v. Glodgett, 421 U.S. 707, 710 at n. 6 (1975). In that same year, Congress also "expressed its displeasure with the state practice which had made

'families in which the father is working but the mother is unemployed eligible'... and restricted the program to children of unemployed fathers." 421 U.S. at 710, n. 6. Congress thus responded to these two perceived abuses of the AFDC-UF program in radically different ways. It resolved the diversity of definitions of "unemployment" by authorizing "a Federal definition of unemployment by the Secretary." H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967), reprinted in [1967] U.S. Code Cong. & Ad. News 2834, 2997. Congress exercised its own judgment, however, as to which parent's unemployment should establish a family's eligibility. The Secretary cannot now usurp that legislative prerogative. His rule-making power does not reach to the remedial substitution of a sex-neutral term for the term "father" which Congress itself selected in 1967.

This Court has previously rebuffed attempts by federal administrators to expand the scope of a Congressional authorization to adopt legislative rules. See Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) (upon examining a statutory exemption for employees "within the area of production (as defined by the Administrator)" of certain commodities, this Court rejected the Administrator's regulations as ultra vires

because they expanded "the grant by Congress . . . to define the area of production beyond the plain geographic implications of that phrase"). The parenthetical qualification in Section 407, i.e., "unemployment (as determined in accordance with standards prescribed by the Secretary)", should similarly be limited to the normal scope of the antecedent term "unemployment". While that term is not completely unambiguous, it denotes an individual's relationship to the labor force. See Batterton v. Francis, 432 U.S. 416, 427-29 (1977). This Court should accordingly reject the Secretary's claim that the parenthetical delegation of discretion encompasses the subsequent term "father". Such administrative attempts to inject extraneous content into a legislative grant of authority are improper.

In short, the Secretary's rule-making powers do not provide a foundation for his present efforts to buttress the District Court's remedy.

III. Plaintiffs-Appellees and Amici Fail to Formulate a Remedial Principle Which Justifies Their Preference for the Dual Wage-Earner Model of the AFDC-UF Program.

Plaintiffs-appellees and amici argue for the dual wage-earner model of the AFDC-UF program by the simple technique of characterization. Given Justice Harlan's perception of "two remedial alternatives" for underinclusive classifications, namely invalidation and extension, Welsh v. United States, 398 U.S. 333, 361 (1970), plaintiffs-appellees and amici assert that the dual wage-earner model comprises the alternative of extension in this case. By contrast, they warn that the principal wage-earner model would institute a remedy different from extension, because it would result in a "radical restructuring of the AFDC-U program." ACLU brief, 69. See also Westcott brief, 71. The principal wage-earner model would, however, similarly extend Section 407 to encompass female breadwinners. Both remedies constitute extension; the only difference is that the dual wage-earner model entails greater extension. The real issue is which model do the principles underlying the remedy of extension dictate under the circumstances of this case.

Amici represent that selection of the dual wage-earner model in this case would follow the remedial tradition established by this Court's decisions in Califano v. Goldfarb, 430 U.S. 199 (1977), Jablon v. Secretary of Health, Education and Welfare, 430 U.S. 924 (1977), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Frontiero v. Richardson, 411 U.S. 677 (1973). ACLU brief, 72. See also Westcott brief, 62. In Goldfarb, Jablon and Wiesenfeld, this Court affirmed — without any discussion of the issue of remedy — District Court orders enjoining the Secretary from enforcing gender-based restrictions on the availability of benefits. In Frontiero, where this Court reversed a District Court ruling in favor of such a restriction, Justice Brennan's plurality opinion simply stated that: "Our conclusion in no way invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse." 411 U.S. at 691, n. 25. These decisions are not helpful in this case because they do not address the issue of the proper substitute for a restrictive term. They simply illustrate that one remedy for a restrictive provision is

an injunction against its enforcement.[2] More importantly, the decisions which amici cite fail to delineate "any consistent basis on which to ground a principled decision on extension."[3]

Amici nevertheless insist that this Court has usually extended underinclusive classifications by, in effect, "substituting one word for another in the defective statute or inserting words into the statute that would expand the class of individuals to whom it applies." ACLU brief, 71-72. Amici accordingly suggest that:

> Remedying the state's unconstitutional exclusion of unemployed mothers involves but one change in the text of the AFDC-U provision: substitution of the term "parent" for the term "father". ACLU brief, 79.

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[2] See Note, Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative, 12 Colum. J.L. and Soc. Probs. 115, 122-23 (1975). The decisions invalidating welfare residency requirements and restrictions upon benefits for illegitimate children which amici cite also involve this limited remedial technique. ACLU brief, 72 at n. 39.

[3] Id., 125.

By virtue of this substitution — amici point out — Section 407 would revert to its original form.

Amici overlook the essential fact that, in 1967, Congress expressly amended Section 407 in order to replace the term "parent", which it had found to be unsatisfactory, with the term "father". If the justifiable purpose of extension is "to render what Congress plainly did intend, constitutional," Welsh v. United States, 398 U.S. at 356, amici's suggestion runs against the strongest evidence of legislative intent. See J. Sutherland, Statutory Construction § 44.13 (4th ed. 1973) ("[T]he fact that a limitation was added by amendment shows that legislative attention was focused very specifically on the question whether the limitation should be imposed...."). In order to be faithful to the intent of Congress, this Court should accordingly substitute the term "principal wage-earner". That term sex-neutrally identifies the family breadwinner whom Congress broadly assumed to be the "father".

IV. Amici's Contention That the Dual Wage-Earner Model is Preferable Because It More Closely Resembles AFDC Ignores the Distinct Nature of the AFDC-UF Program.

In conjunction with plaintiffs-appellees (Westcott brief, 76), amici argue that the dual wage-earner model is preferable because it would render the AFDC-UF program "consistent with the gender-neutral nature of the rest of the AFDC program, in which eligibility for assistance is based on the death, absence or incapacity of either parent." ACLU brief, 79-80. Amici ignore the fundamental differences in nature between the AFDC and AFDC-UF programs which render inapposite any argument based on consistency. The AFDC program encompasses families where only one parent capable of caring for the children remains in the home. Congress acted to assist these families left without a breadwinner, King v. Smith, 392 U.S. 309, 328 (1968), so that the remaining parent could care for the children "at home without having to go to work." Batterton v. Francis, 432 U.S. 416, 418 (1977). AFDC accordingly covers those families where one parent is "deceased, incapacitated or continually absent." King v. Smith, 392 U.S. at 329. The death, incapacity or absence of one parent is statutorily

presumed to require the presence of the other parent in the home and, therefore, to deprive the family of a breadwinner. The AFDC-UF program, on the other hand, assists families where two parents capable of caring for their children remain in the home. By contrast with AFDC, the AFDC-UF program thus covers intact families who retain the capacity to have one parent in the home and one parent in the labor force. See Lurie, Major Changes in the Structure of the AFDC Program Since 1935, 59 Cornell L. Rev. 825, 828 (1974) ("The addition [of AFDC-UF] marked a significant deviation from the previous objective of AFDC, which was to provide aid only to families which were incapable of supporting themselves."); Lewis v. Martin, 397 U.S. 552, 559 (1970) (The purpose of AFDC is to provide "aid to 'needy' children, except where there is a 'breadwinner' in the house who can be expected to provide such aid himself."). An intact family is presumed not to be needy unless the family breadwinner has become unemployed. Amici's suggestion that AFDC-UF should conform to AFDC ignores the substantive differences between these programs.

V. Plaintiffs-Appellees and Amici Cannot Escape the Fact That the Dual Wage-Earner Model of the AFDC-UF Program is Significantly More Expensive than the Principal Wage-Earner Model.

In an effort to hide the greater costs associated with the District Court's remedy behind a veil of confusion, plaintiffs-appellees and amici twist and tear at the Commissioner's estimate of the cost differential between the principal wage-earner and the dual wage-earner models of the AFDC-UF program. Westcott brief, 68-71; ACLU brief, 81-87. However, the Commissioner stands by the cost estimates properly put before the District Court by the affidavit of a professional budget analyst (A. 49-56). Commissioner's brief, 34-37.

In their efforts to disparage the cost estimates presented by the Commissioner and the Secretary, amici finally resort to the argument that "the wide discrepancy between the two sets of figures undermines the credibility of both." ACLU brief, 82 at n. 47. The difference between the Commissioner's and the Secretary's cost estimates reflects their differing assumptions as to the rate at which potentially eligible families would begin to participate in an extended

AFDC-UF program.[4] The cost estimates are otherwise quite consistent.

VI. The Notion Advanced by Plaintiffs-Appellees and Amici that Adoption of the Principal Wage-Earner Model Should Be Left to Congress Improperly Implies That the Judiciary Should Abdicate Its Remedial Responsibility.

Plaintiffs-appellees and amici uniformly insist that only Congress can evaluate the propriety of the principal wage-earner model of the AFDC-UF program. Westcott brief, 18, 77-80; ACLU brief, 25-27, 93-123. Without explaining why this Court need not similarly defer to Congress with respect to their dual wage-earner model,

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[4] See Memorandum of Appellee . . . Commissioner of the Massachusetts Department of Public Welfare . . . in Partial Support of Appellant Califano's Application for a Stay, 6 at n. 6 (filed January 2, 1979, in No. 78-437).

plaintiffs-appellees declare that:

> A principal wage earner test must . . . be rejected because this Court lacks the authority under Article III and the competence to resolve the many important policy issues involved in a principal wage earner test. These include the appropriate definition of a principal wage earner, the treatment of currently eligible families who would otherwise be terminated, and the political question whether such a test should be adopted since it would fall most heavily on women workers.... Resolution of these issues is appropriately left to Congress. Westcott brief, 18.

Selection of either form of extension, however, requires judicial evaluation of the factors which bear upon the remedial decision how "to render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. at 356. Plaintiffs-appellees and amici now urge this Court to ignore Justice Harlan's admonition that:

> If an important congressional policy is to be perpetuated by recasting unconstitutional legislation . . . the analytically sound approach is to accept responsibility for this position. 398 U.S. at 355.

This Court should shun the suggestion of amici that it is somehow relieved of this responsibility because its ultimate decision on remedy "is of course only a form of tentative adjudication." ACLU brief, 122. That Congress itself retains ultimate responsibility for the structure of the AFDC-UF program does not lessen this Court's independent obligation to shape a remedy consonant with the legislative history and administrative structure of the AFDC-UF program.[5]

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[5] This Court need only determine the appropriate sex-neutral substitute for the term "father" in Section 407. If this Court approves the term "principal wage-earner", the further definition of that term should, upon remand, be left to the administrative discretion of the Secretary under 42 U.S.C. §1302 (1976).

CONCLUSION

Appellees and amici have failed to advance any principled argument demonstrating that this Court should not reverse the District Court's order adopting the dual wage-earner model of the AFDC-UF program.

Respectfully submitted,

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April 10, 1979